Helping Loose Ends Meet? The Judicial Acknowledgement of Soft Law as a Tool of Multi-Level Governance

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Soft law, competition, open method of co-ordination, multi-level governance, hybridity.

Abstract

In the established multi-level governance system of the European Union, the Court of Justice was instrumental in framing a supranational constitution. During the recent years, a vast variety of soft law and soft methods of governance were put in place, 'loosely' binding together the different layers of EU governance. While the Union Courts sometimes engage with such instruments and methods, they fail to acknowledge important consequences that soft law can have on the rights and obligations of individuals. This approach can have a negative impact on the justiciability of soft law, creating the premises for a vast body of EU instruments to escape judicial control. Furthermore, in the absence of judicial recognition, soft law fails to accomplish some of its key objectives, such as fostering legal certainty, transparency, and the consistent application of rules in the EU multi-level governance system.

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1 Introduction

Governance in the European Union may be represented as a 'loosely coupled multi-level system'[2] along three dimensions: the relations between EU – national – subnational levels; the relations between the MS or between various sub-national authorities; and the relations between executives – parliaments – interest groups/constituencies. These different levels of policy making are connected 'not by binding decisions but by transfers of information, not by delegates with clearly defined mandates but by representatives who negotiate on goals and not fixed positions'.[3] In this construction, 'new' modes of governance[4] appear instrumental, and they are preferred over traditional models of government, 'where collectively binding decisions are taken by elected representatives within parliaments and implemented by bureaucrats within public administrations'.[5] In the European context, soft law and the Open Method of Co-ordination (OMC) are central to new governance, because of their lack of

[2] A. Benz, 'The European Union as a loosely coupled multi-level system' in H. Enderlein et al. (eds), *Handbook on multi-level governance* (Edward Elgar, 2010), p. 217-218.

[3] A. Benz, 'Two types of multi-level governance: Intergovernmental relations in German and EU regional policy' 10 *Regional and Federal Studies* (2000), p. 33.

[4] 'Types of political steering in which non-hierarchical modes of guidance, such as persuasion and negotiation, are employed, and/or public and private actors are engaged in policy formulation' A. Héritier, 'New Modes of Governance in Europe: Policy-Making Without Legislating?' in A. Héritier, *Common Goods Reinventing European and International Governance*, (Rowman & Littlefield, Lanham 2002), p. 185.

[5] O. Treib et al., 'Modes of Governance: Towards a Conceptual Clarification', 14 *Journal of European Public Policy* 1 (2007), p. 3.

legally binding force and the emphasis on persuasion and guidance rather than on enforcement by a coercive authority.[6]

Analysing multi-level governance (MLG) from an instruments perspective is not new.[7] Indeed, MLG instruments have been seen as institutions, representing policies and issues in particular ways, and as forms of power, producing effects, sometimes independently of their original aims and objectives.[8] This article adds a different angle to the study of soft law and the Open Method of Co-ordination as tools of MLG, by assessing the role that they play in adjudication. Studying the way in which the Courts interact with such instruments might give us further insides into the constitutional adulthood of MLG from two points of view. First, the constitutional balance of MLG can be ensured to an important extent in a judicial manner.[9] Of course, this does not mean that MLG can reach constitutional adulthood only through adjudication. However, judicial oversight of MLG instruments can help connect the latter to core constitutional values, such as legitimacy, participation, transparency, or legal certainty.[10] Second, the CJEU is traditionally considered as the creator of a 'federal type structure' in Europe.[11] Given EU's departure from a state-centered federalist model, and taking into account the recent proliferation of 'new' governance mechanisms, the question arises whether

[6] *Ibid*, p. 14.

[7] See *Governing the European Union: Policy Instruments in a Multi-Level Polity,* special issue of 33 *West European politics* 1 (2010).

[8] H. Kassim and P. Le Galès, 'Exploring Governance in a Multi-Level Polity: A Policy Instruments Approach' 33 *West European Politics* (2010) 1, p. 4-5.

[9] K. Lenaerts, 'Constitutionalism and the Many Faces of Federalism' 38 *The American Journal of Comparative Law* (1990), p.205.

[10] See L. Senden, 'Soft Post-Legislative Rulemaking: A Time for More Stringent Control' 19 *ELJ* (2013) 57 p. 70 – 72.

[11] E. Stein, 'Lawyers, Judges and the Making of a Transnational Constitution' 75 *AJIL* (1981), p.1.

the Court can play the same role now, and contribute to keeping the 'loosely coupled' layers of governance together. In order for this to happen, Courts should engage with soft law, thus enhancing the effectiveness of such instruments. This task is made difficult by the ambiguous legal status of soft law, which appears to place automatically such instruments outside the courtroom, [12] in a world of 'governance' as opposed to the traditional, command-and-control world of adjudication. This paper addresses the question whether the CJEU is ready (mature enough?) to ensure oversight for soft law and instruments stemming from OMC processes, while acknowledging the full spectrum of functions that they can play in a multi-level governance context. In so doing, the paper is less concerned with the differences between soft law and instruments stemming from the OMC processes. Without generalizing conclusions from one sector to the other, the paper strives to unravel existing trends in the case law in relation to the vast variety of 'new governance' instruments. Furthermore, the analysis is limited to the case law of the Luxembourg courts, although the importance of conducting a study of national judgment is acknowledged and further research on this topic is encouraged.

The paper starts by giving a short account of soft law and the OMC in the European Union. It continues by streamlining the role that Courts can play in a multi-governance context regulated by such instruments, while observing that the Courts can both influence and be influenced by soft law and soft methods of governance. The paper identifies several hurdles that stand in the way of judicialization of soft law and full judicial endorsement of its regulatory functions. It notes that Courts can be influenced by soft law and new governance methods, although this influence cannot yet be empirically proven in some sectors.

[12] J. Klabbers, 'The Undesirability of Soft Law', 67 *Nordic Journal of International Law* (1998), p. 382.

2 Soft methods of coordination

Regulating multi-level types of organizations through 'soft' methods is not new. The concept of 'soft law' originates in public international law and dates back to the early1970s, [13] with the 1980s bringing a renewed interest in this type of instruments.[14] The emergence of the notion is closely connected in the literature to the challenges imposed on traditional law-making methods by globalization, with the growing importance of non-state actors on the international plane[15] and with the growth of international institutions.[16]

The most quoted definition of soft law is by Snyder, who considers that it consists of 'rules of conduct which, in principle, have no legally binding force but which nevertheless may have practical effects'[17] and also legal effects.[18] In the EU context, soft law accounts for more than 10% of the law,[19] and consists of recommendations, opinions (mentioned in Article 288

[13] I. Seidl-Hohenveldern, 'International Economic Soft Law', 163 *Recueil des Cours de l'Academie de Droit International* (1979), p. 173-177.

[14] K. Wellens, G. Borchardt, 'Soft Law in European Community Law' 14 *ELRev* (1989), p. 268.

[15] U. Mörth, *Soft Law in Governance and Regulation: an Interdisciplinary Analysis* (Edward Elgar, Cheltenham 2004), p. 4.

[16] C. Chinkin, 'Normative Development in the International Legal System' in D. Shelton (ed.), *Commitment and Compliance: The Role of Non-Binding Norms in the International Legal System*, (OUP, Oxford 2000), p. 28.

[17] F. Snyder, 'The Effectiveness of European Community Law: Institutions, Processes, Tools and Techniques' 56 *MLR* (1993), p. 64.

[18] I thank Professor Snyder for suggesting this completion to his initial definition of soft law during the 6th International Workshop for Young Scholars, 'The Evolution of European Courts: Institutional Change and Continuity', Dublin, 16-17 November 2007.

[19] A. Von Bogdandy et al., 'Legal Instruments in European Union Law and their Reform: a Systematic Approach on an Empirical Basis' 23 *YEL* (2004), p. 112.

TFEU), but also other instruments such as communications, notices or guidelines. It is contrasted with hard law, arising 'from the treaties, regulations and the Community method',[20] and taking the form of Art 288 regulations, directives and decisions.[21] Contrary to soft law, hard law is endowed with binding legal force, produces general and external effects, is adopted by the Community institutions according to specific procedures and has a legal basis in the Treaty.[22]

The use of soft law in European law dates back to 1962,[23] and became, after the accomplishment of the internal market, quite frequent in the activity of the European Commission. Recently, whole regulatory soft mechanisms were developed at the EU level. Starting with the area of economic policy, a 'model of soft policy coordination'[24] was institutionalized in sectors such as employment and social policy, inspired by methodologies developed at the OECD level.[25] The Summit of March 2000 codified this model as the 'Open Method of Co-ordination' (OMC) and enounced its purpose to facilitate the implementation

[20] D. Trubek, et al., "'Soft Law", "Hard Law", and the EU Integration' in G. de Búrca and J. Scott (eds.) *Law and New Governance in the EU and the US*, (Hart Publishing, Oxford 2006), p. 65.

[21] F. Beveridge and S. Nott, 'A Hard Look at Soft Law' in P. Craig and C. Harlow (eds.), *Lawmaking in the European Union* (Kluwer, 1998), p. 285; L. Senden & S. Prechal, 'Differentiation in and Through Community Soft Law' in B. de Witte et al. (eds), *The Many Faces of Differentiation in EU Law*, (Intersentia, Oxford 2001), p. 185 believe that only regulations and directives can be considered hard law.

[22] L. Senden, *Soft Law in European Community Law* (Hart, Oxford 2004), p. 45.

[23] L. Senden & S. Prechal, in B. de Witte et al. (eds), *The Many Faces of Differentiation in EU Law*, p. 181.

[24] K. Jacobsson, 'Between Deliberation and Discipline: Soft Governance in the EU Employment Policy' in U. Mörth (ed.) *Soft Law and Governance and Regulation: An Interdisciplinary Analysis*, (Edward Elgar, Cheltenham 2004), p. 82.

[25] L. Tholoniat, 'The Career of the Open Method of Coordination: Lessons from a 'Soft' EU Instrument' 33 *West European Politics* (2010), p. 96.

of the Lisbon Strategy.[26] Soft law instruments are an important part of the Europe 2020 initiative,[27] as the Commission called for institutionalization through guidelines and political recommendations.[28]

Since 2000, the OMC emerged as a dynamic mode of governance, whose structure and objectives have been transforming over time.[29] It consists of fixing guidelines for the Union, and timetables to achieve goals in certain policy fields. It also entails establishing indicators and benchmarks for the MS in order to compare best practices. The OMC presupposes translating the European guidelines in national policies, and involves monitoring, evaluation and peer review in order to foster mutual learning.[30] While soft law comes in an 'infinite variety', the OMC processes themselves are quite diverse and research shows important variation between them depending to the issue regulated.[31]

Soft methods of governance are thought to be best suited to deal with the complexity of European affairs, their diversity,[32] as well as with the bargaining constraints of sovereignty and the complicated repartition of competences between the Community and the Member

[26] Conclusions of the Presidency,Lisbon European Council, 23-24 March 2000, Part I, pt. 5.

[27] European Council Conclusions 17 June 2010, EUCO 13/10.

[28] European Commission Europe 2020: a strategy for smart, sustainable and inclusive growth COM (2010) 2020, para. 5.1.

[29] C. de la Porte and P. Pochet, 'Why and how (still) study the Open Method of Co-ordination (OMC)?' 22 *Journal of European Social Policy* (2012), p. 338.

[30] Lisbon European Council, Presidency Conclusions, 24/03/2000, para.37.

[31] Tholoniat, 33 *West European Politics* (2010), p. 95.

[32] A. Schäfer, 'A New Form of Governance? Comparing the Open Method of Co-Ordination to Multilateral Surveillance by the IMF and the OECD', 13 *Journal of European Public Policy* (2006), p. 84.

States (MS).[33] Thus, soft law and the OMC have become instrumental in the EU multi-level governance, as their flexibility is highly valued in regulating sensitive sectors in which agreements are very hard to reach, in tackling issues of regulatory philosophy and broad policy, and in addressing situations where swift action is imperative. Soft methods of governance are both used in areas of strong competence of the EU, as well as in areas where the MS still have considerable power.

For example, in the competition law area – an area of strong EU competence – soft law has been having an increasing role since the implementation of a multi-level system of enforcement.[34] Following the reform brought by Regulation 1/2003,[35] the system of competition law enforcement was decentralized and national competition authorities (NCAs) together with national courts now share competence to apply competition rules. The inherent diversity of this decentralized system is managed through the intermediary of the European Competition Network (ECN), a ('new' governance) mechanism ensuring coherence and effectiveness,[36] and also through soft law that 'went from being purely complementary to the core of the business of competition law enforcement'.[37] Soft law fulfils an important

[33] See on this K. Sisson & P. Margisson, '"Soft Regulation" - Travesty of the Real Thing or New Dimension?', *The Economic and Social Research Centre: "One Europe or Several?" Programme Working Paper no. 32/01* (2001).

[34] F. Cengiz, 'multi-level governance in Competition Policy: the European Competition Network'35 *ELRev* (2010), p. 660.

[35] Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2003] OJ L1/1.

[36] I. Maher, 'Competition Law Modernization: an Evolutionary Tale?' in P. Craig and G. De Búrca (eds), *The Evolution of EU Law* (OUP, Oxford 2011), p. 737.

[37] I. Maher, 'Regulation and Modes of Governance in EC Competition Law: What's New in Enforcement?' 31 *Fordham Int'l LJ* (2008), p. 1740.

information function, as, by clarifying competition rules, it helps undertakings to discover anticompetitive practices and to try to stop them.[38]

The OMC as a soft method of governance has been used as a flexible tool that can stretch European competences in sensitive areas, where MS show reluctance in relinquishing power to Brussels. The OMC has a role to play in fields of limited EU competence, such as labour, tax, welfare, education, and migration, but has also helped identifying an EU interest and create a role for the European Union in new areas.[39] The OMC coordinated action in newish areas affected by EU competence such as healthcare, or supplemented existing competence, feeding traditional modes of government (in environment).[40] It allowed the development of regulatory and policy coordination instruments in fields such as finance, in the context of scarcity of financial resources at EU level.[41] Through the intermediary of the OMC, political and ideological constraints were bypassed, while national stakeholders were involved in EU matters. By enhancing information exchange,[42] the OMC influenced the EU system as a whole, and rendered it more transparent. Indeed, through the OMC processes, MS have disclosed their priorities and interests, hence enticing contestation of national policies.

However, one of the most important drawbacks of soft instruments of MLG is their legitimacy deficit. Although cheap, fast and flexible, the procedures for the adoption of soft law generally tend to circumvent the more costly, but legitimate, decision-making ways. Therefore, recourse to soft law might enhance the discretion of Community institutions to the

[38] D. Lehmkuhl, 'On Government, Governance and Judicial Review: The Case of European Competition Policy' 28 *Journal of Public Policy* (2008),, p. 147.

[39] Tholoniat, 33 *West European Politics* (2010), p. 113.

[40] E. Szyszczak, 'Experimental Governance: The Open Method of Coordination' 12 *ELJ* (2006), 489-493.

[41] Tholoniat, 33 *West European Politics* (2010), p. 110.

[42] *Ibid*.

detriment of the European Parliament and Member State competences.[43] Albeit Parliament's involvement in the decision making process increases through the intermediary of soft law such as inter-institutional agreements,[44] it was noted that its position is not necessarily strengthened, because its bargaining power remains the same: the outcome of the final negotiations on legislation can depart from the content of the inter-institutional agreement.[45] Even though the preparatory and informative soft law instruments fulfill an important function in the pre-legislative stage because it is through these means that the Parliament is informed and consulted on future legislation,[46] many other soft law instruments are concluded without parliamentary involvement. An example is the soft law issued by the European Commission in competition law.[47]

Furthermore, although the OMC is an instrument conceived to tackle diversity in a MLG system, given the relative lack of involvement of national parliaments, it is a method that can paradoxically be seen as a centralizing factor.[48] Even though recent empirical studies noted parliamentary engagement with information from different OMCs, this happens mostly in

[43] F. Snyder, 'Soft Law and Institutional Practice in the European Community' in S. Martin (ed.), *The Construction of Europe: Essays in Honour of Emile Noël* (Kluwer 1994), p. 201-203.

[44] F. Snyder, 'Interinstitutional Agreements: Forms and Constitutional Limitations' in G. Winter (ed.) *Sources and Categories of European Union Law: A Comparative and Reform Perspective* (Nomos Verlags-Ges, Baden-Baden 1996), p. 459.

[45] I. Eiselt and P. Slominski, 'Sub-Constitutional Engineering: Negotiation, Content, and Legal Value of Interinstitutional Agreements in the EU', 12 *ELJ* 2 (2006), p. 209.

[46] Senden, *Soft Law in EC Law*, p. 483.

[47] H. Hofmann, 'Negotiated and Non-Negotiated Administrative Rule-Making: the Example of EC Competition Policy' 43 *CMLRev* (2006), p. 172.

[48] E. Szyszczak, 'Experimental Governance: The Open Method of Coordination' 12 *ELJ* (2006), p. 495-496.

fields previously regulated through hard law.[49] Stakeholder and expert participation in the decision-making process is not always ensured for soft law instruments, 'since consultative procedures are less rigorously adopted and structured in relation to rules whose binding nature is uncertain'.[50]

Another set of concerns regarding the use of soft law have a functional nature. First the goals pursued by soft law and soft methods of governance appear sometimes contradictory. It was pointed out that the OMC is used on the one hand in order to feed the policy process with new items for the EU agenda, while on the other hand it is used in order to ensure predictability of implementation.[51] The two objectives are incompatible, given that developing new policies means that EU actions are less and less predictable and subject to sudden changes. Consequently, the OMC was criticized often as it did not deliver the expected results.

Second, there is a lot of uncertainty as to the legal effects that soft law can have, absent legally binding force. In competition law, NCAs and courts are not bound in any way to apply EU soft law, while the Commission has an obligation to take these instruments into account. Thus, depending on the level where the decision is taken, soft law may or may not apply to a certain case. Furthermore, the high specificity of EU soft law is an element that increases divergence between the community of competition law professionals and other legal communities.[52] As for the OMC, conclusive evidence is yet to be found regarding its precise

[49] R. De Ruiter, 'Full disclosure? The Open Method of Coordination, parliamentary debates and media coverage' 14 *European Union Politics* (2013), p. 111.

[50] R. Baldwin, *Rules and Government* (Clarendon, 1995), p. 284.

[51] Tholoniat, 33 *West European Politics* (2010), p. 94.

[52] I. Maher, 'Functional and Normative Delegation to Non-Majoritarian Institutions: The Case of the European Competition Network' 7 *Comparative European Politics* (2009), p. 425.

impact on learning and change.[53] This might have an impact on EU institutional balance, as the European Commission might lose credibility as a result of potential failures in the implementation of Community policies, and the Council might lose legitimacy and political weight.[54] The OMC might also undermine the achievements of the Community method as it can replace it with sub optimal results.[55]

Finally, OMC and soft law challenge core principles of EU law and EU law itself. Supremacy and direct effect do not apply to such instruments that lack legally binding force. In hybrid situations, such as that of the SGP, hard law would appear according to some commentators 'emasculated', as targets and content of the measure – set through soft law instruments – vary at the discretion of the regulated parties themselves, thus rendering the hard law sanctions meaningless.[56] Some authors consider even that legal scholars should arguably not engage with OMC as a new mode of governance unless 'an OMC objective mirrors an objective in another legal instrument, whereby it can influence in the shadow of hierarchy'.[57]

3 Role of Courts

In this context, one may wonder what the role of courts can be in the control and/or enforcement of soft law. On the one hand, the question is whether Courts are the appropriate institutions to control and enforce soft law. Due to its informative and educative role, soft law

[53] de la Porte 22 *Journal of European Social Policy* (2012), p. 340-344.

[54] V. Hatzopoulos, 'Why the Open Method of Coordination Is Bad For You: A Letter to the EU' 13 *ELJ* (2007), p. 320

[55] *Ibid.*, p. 319-320.

[56] *Ibid.*, p. 323.

[57] de la Porte, 22 *Journal of European Social Policy* (2012), p. 344.

appears fashioned for non-judicial forms of dispute settlement.[58] The judicial reliance on soft law is arguably undesirable, because whenever dealing with such sources, the domestic and international courts might tend to transform them into hard law. [59] On the other hand, given the proliferation of soft law and soft modes of governance, the European Courts cannot simply ignore this reality. This is especially because soft law is often taken seriously by the MS authorities and courts,[60] and in certain areas the European Commission is bound to apply such instruments.[61] If EU Courts ignored soft law, they would allow a large amount of regulatory material escape judicial control, while losing all potential influence in shaping and evaluating the processes leading up to the adoption of such instruments. [62]

Thus, presenting courts and governance (or law and governance for that matter) in contrast over simplifies reality. This paper endorses a nuanced view of adjudication, as a process that pertains to more than simply applying the rules, and that involves complex assessments of interests and values that could ultimately encourage litigants to rely on new forms of governance and cooperation.[63] In a 'new governance' context, the role of the courts needs to be redefined: courts are not enforcers of legal rules but rather 'a source of communicating

[58] C. Chinkin, 'The Challenge of Soft Law: Development and Change in International Law' 38 *ICLQ* (1989), p. 862-865.

[59] See J. Klabbers, 'Informal Instruments Before the European Court of Justice' 31 *CMLRev* (1994); 'The Redundancy of Soft law', 65 *Nordic Journal of International Law* (1996).

[60] J. Scott, 'In Legal Limbo: Post-legislative Guidance as a Challenge for European Administrative Law' 48 *CMLRev* (2011), p. 344.

[61] O. Ştefan, 'Hybridity Before the Court: A Hard Look at Soft Law in the EU Competition and State Aid Case Law' 37 *ELRev* (2012).

[62] Scott, 48 *CMLRev* (2011), p. 344-348.

[63] K. Armstrong, 'The Character of EU Law and Governance: From 'Community Method' to New Modes of Governance' 1 Current Legal Problems (2011), p. 27.

ideas and experience… without being specifically prescriptive in relation to any particular form'.[64]

Thus, the relation between courts and governance should ideally be 'dynamic and reciprocal:'[65] courts can shape the necessary link between the realm of governance and that of command-and-control, while adjudication and new governance get to influence each other reciprocally, ideally creating hybrid forms of interaction.[66] However, for this to take place, it is important that soft instruments of MLG enter within the Court's sphere of jurisdiction. Such instruments should be challengeable in front of the Courts, in order to ensure full judicial control and influence. They should also be recognized as viable swords or shields for litigants to use in cases before the Court. This would increase the effectiveness of soft law and would ensure that their role as MLG instruments is better accomplished.

The hurdles concerning the justiciability of soft instruments of MLG are numerous. Authorship is sometimes problematic, given that many of these instruments are often the result of negotiations between MS or stakeholders, and do not emanate solely from the EU institutions. Such co-authored instruments fall outside of Court competence in accordance to Article 263 TFEU.[67] However, the most important hurdle in the way of justiciability and Court recognition of soft law is the miss-match between the actual effects of soft law and the readiness of the EU Court to acknowledge them. The range of effects entailed by soft law is wide. These can be of practical or of legal nature, but remain rather uncertain from the point

[64] J. Scott & S. Sturm, 'Courts as Catalysts: Rethinking the Judicial Role in New Governance', 13 *Columbia Journal of European Law* (2007), p. 572.

[65] *Ibid.*, p. 567.

[66] T. Hervey, 'Adjudicating in the shadow of informal settlement?: the Court of justice of the European Union, "new governance" and social welfare', 63 *Current Legal Problems* (2010), p. 114.

[67] Scott, 48 *CMLRev* (2011), p. 349-350.

of view of (traditional) law, absent the legally binding force of the instrument. Enforceability of soft law is hence problematic. [68]

Legal effects consist of the capacity of EU legal instruments to change the rights and obligations of actors.[69] Soft law can thus limit the discretion of the enacting institution, create legitimate expectations for individuals, or serve as legal basis for national legislation. In a court of law, the effects of soft law include: providing the basis for judicial review; being the object of an action for annulment; being used in litigation by the parties to a trial; and serving as an aid in the interpretation of hard law provisions.[70] The practical effects of soft law include the transformations that soft law may generate in the behaviour and practices of the MS and the institutions of the Union. Soft law can lead to policy change and it induces subtler changes at the level of discourse, understanding and policy principles.[71] Hence, 'formally non-binding agreements can gradually become politically, socially and morally binding for the actors involved'[72] by the intervention of certain devices other than the legal force of an act, and related to knowledge and meaning making. These devices have a strong sociological character and include: common discourse; the symbols of a common project; strengthening socialization through repeated meetings; mobilizing the actors and their partnership through networks; and iterative processes.[73] In the long run, states may integrate, into their national

[68] Chinkin, 38 *ICLQ* (1989), p. 862-865.

[69] T. Hartley, *The Foundations of European Community Law* (7th ed., OUP, Oxford 2010), p.354.

[70] F. Snyder, in G. Winter (ed.) *Sources and Categories of European Union Law: A Comparative and Reform Perspective*, p. 463.

[71] Jacobsson, in U. Mörth (ed.) *Soft Law and Governance and Regulation*, p. 89.

[72] K. Jacobsson, 'Soft Regulation and the Subtle Transformation of States: the Case of EU Employment Policy', 14 *Journal of European Social Policy* (2004, p. 359.

[73] Jacobsson, in U. Mörth (ed.) *Soft Law and Governance and Regulation*, p. 90-98.

orders, norms and practices established by way of soft law. [74] Furthermore, soft law can helped marginalized groups at the national level to challenge dominant ideologies, and achieve results that would not have been attained through hard law.[75]

This large variety of effects shows that soft law matters and has important practical and legal consequences for national and EU authorities, as well as for individuals. What is more, despite the fact that it is deprived of legally binding force, the effects of soft law sometimes appear binding, from a legal or even an extra-legal point of view. The problem is that many of the political, moral, or even social commitments might have important consequences, although they are considered extra-legal by the Courts and are not enforced as such. There are only few circumstances when Courts acknowledge the effects of soft law: if soft law introduces supplementary obligations not mentioned in hard law provisions; when soft law is issued by an institution as a means of structuring its discretion; finally when soft law becomes binding on MS as result of negotiations coupled with Treaty obligations.[76] Consequently it appears that 'for the issue of justiciability, the distinction between soft and hard law remains a valid distinction, while for policy development, implementation and assessment, the boundaries between hard and soft are, indeed, more blurred'.[77] This paper argues that the Courts should be less concerned with ensuring the boundaries between soft and hard law, and more willing to acknowledge the practical consequences of soft law, as well as the functions that it is meant to achieve in a MLG context.

[74] R. Dehousse & J.H.H. Weiler, 'EPC and the Single Act: from Soft Law to Hard Law?' in M. Holland (ed.), *The Future of European Political Cooperation*, (Macmillan, London 1991), p. 132.

[75] Beveridge & Nott, in P. Craig and C. Harlow (eds.), *Lawmaking in the European Union*, p. 293.

[76] Scott, 48 *CMLRev* (2011), p. 339-343.

[77] de la Porte, 22 *Journal of European Social Policy* (2012), p. 339.

4 The Influence of Courts on Soft law and Soft Governance Methods

First, courts have the capacity to inculcate within governance structures rule of law values and principles through judicial control. Courts could actively influence deliberation processes by determining the standards for review of soft law, encouraging the most principled approaches towards soft law, while providing 'an incentive structure for participation, transparency, principled decision-making and accountability which in turn shapes, directly and indirectly, the political and deliberative process'.[78] Judicial review of soft law can be done through the direct actions route, as laid down in the seminal *Commission v. Council (ERTA)* judgment. On that occasion, the Court went beyond a literal interpretation of Article 263 TFEU, holding that soft law instruments might be reviewable provided they have 'definite legal effects'.[79] Parties can also challenge soft law incidentally, in proceedings that have a different main object. Indeed, Article 277 TFEU can be used to challenge not only hard law and regulations, but also all 'acts of the institutions which, although they are not in the form of a regulation, nevertheless produce similar effects'.[80] Thus, the extent to which soft law is justiciable depends on the readiness of the Court to give legal weight to the effects such instruments might entail in practice.

Second, by acknowledging soft law and applying it in cases, Courts endorse[81] the existing regulatory framework that often combines soft and hard law, creating hybrids.[82] Thus, courts might influence soft law and new governance methods by simply referring to them in their

[78] Scott & Sturm, 13 *Columbia Journal of European Law* (2007), p. 567.

[79]Case 22/70 *Commission v. Council* [1970] ECR 263, para. 55.

[80] Case 92/78 *Simmenthal v. Commission* [1979] ECR 777, para. 40.

[81] Ştefan, 37 *ELRev* (2012), p. 49.

[82] D. Trubek, L. Trubek, 'New Governance and Legal Regulation: Complementarity, Rivalry and Transformation' 13 *Columbia Journal of European Law* (2007), p. 539.

case law, and by accepting parties' arguments using soft law as a sword or a shield in litigation. By doing so, Courts could enhance the effectiveness of soft law while helping to achieve the regulatory goals of such instruments. However, as it will be seen below, while emphasizing the difference between legally binding force and legal effects of norms, current EU judicial practice fails to acknowledge important consequences that soft law can have on the rights and obligations of individuals. This approach can have an important impact on the functions that some soft law instruments play at a regulatory level. Thus, even if certain soft law is issued by the European Commission in order to enhance the protection of several principles of law at the same time, only some of those values can be accommodated.

4.1 Judicial control of soft law

Courts have admitted that sometimes soft law interpreting hard law provisions creates new obligations and has a binding legal effect. In such situations, soft law is considered *ultra vires* and is annulled by the Courts, as only instruments having a legally binding force can lawfully create new obligations for individuals or MS. A classical example is the annulment[83] of the communication on the application of the financial transparency directive to public undertakings in the manufacturing sector[84]. While a general obligation to supply information on financial relations between the State and public undertakings was provided for in the directive, the implementing communication created a supplementary obligation, by requiring specific data to be sent annually. The Court considered that the communication added to the

[83] Case C-325/91 *France v. Commission* [1993] ECR I-3283, para. 31.

[84] Commission Communication to the Member States -- Application of Articles 92 and 93 of the EEC Treaty and of Article 5 of Commission directive 80/723/EEC to public undertakings in the manufacturing sector [1991] OJ C273/2.

obligations laid out by the directive, and annulled it for failure to provide the legal basis from which it derived its binding force, in accordance to the principle of legal certainty.[85]

Thus, the Court does not judge admissibility of an action only by the form of the act, but analyses its substance in order to determine whether it produces legal effects or not, and whether it can be judicially controlled or not. This should be putting minds at ease, as the Court appears to remain the watchdog of EU legislation, be it soft or hard. Furthermore, the Court employs a refined analysis and distinguishes between instruments deprived of legally binding force and hard law, while not attempting to turn one into the other as critics of soft law might argue. There is thus a limit to the obligations that can be lawfully imposed by instruments deprived of legally binding force, and the CJEU is ready to verify whether that limit was overstepped or not.

However, this limit is often difficult to grasp, and it depends entirely on the criteria employed in order to determine whether soft law introduces new obligations that go beyond what is written in hard law provisions. In the case of vague, general hard law norms, it may 'frequently be impossible to make a clear determination of where the boundaries of the existing obligation begin and end'.[86] Even though a soft law instrument might not seem to introduce new legal obligations, it might promote a very radical interpretation of an obligation provided in a regulation or a directive thus having in practice significant effects on the legal situation of individuals or MS. Indeed, one can envisage that in the absence of the soft law instrument, the authorities might interpret the specific obligation provided in the hard law provision in a more lenient or indeed more stringent way. In the European MLG system, this

[85] *France v. Commission*, paras. 26 and 30.

[86] Scott, 48 *CMLRev* (2011), p. 342.

issue is very important as soft law is applied by national authorities at their absolute discretion.

Thus, in order to ensure enhanced judicial control of soft law, the Courts should relax its admissibility rules, while recognizing the actual impact that soft law may have in practice on the legal situation of individuals. The next subsection will focus on examples where the Courts failed to acknowledge the full spectrum of effects of soft law instruments. It is argued that this failure can have negative consequences on the accomplishment of the regulatory functions that soft law should play in the European MLG system.

4.2 Individual rights protection

The literature criticizing the use of soft law in court argues that judicial transformation of soft into hard law could occur by the positive invocation of soft law, i.e. the use of soft law in litigation by individuals or by challenging a soft law instrument via Article 263 TFEU.[87] However, a study of the competition case law shows that even though the Courts frequently rely on communications, guidelines or notices of the European Commission, they are careful to distinguish between soft and hard law. Judgments such as *Dansk Rørindustri*[88] acknowledged the binding effects of the antitrust Guidelines on fines;[89] in *BASF* a decision of the Commission was considered to be 'vitiated of illegality'[90] because of the misapplication of

[87] Snyder, 56 *MLR* (1993), p. 65; Hofmann, 43 *CMLRev* (2006), p. 165.

[88] Joined Cases C-189, 202, 205, 208 & 213/02 *Dansk Rørindustri and others v Commission* [2005] ECR I-5425, para.211.

[89] Guidelines on the method of setting fines imposed pursuant to Article 15 (2) of Regulation No 17 and Article 65 (5) of the ECSC Treaty, OJ 1998, C 9/3.

[90] Case T-15/02 *BASF v Commission* [2006] ECR II-497, para. 541.

the leniency notice;[91] and in *Kronofrance*[92] the Court annulled a decision because the Commission failed to correctly apply the adjustment factors for maximum amount of aid calculations laid down in the framework on aid for large investment projects.[93] A study of competition and State aid case law reveals over 600 judgments, orders and opinions where the Luxembourg Courts and their Advocates General acknowledged the binding legal effects of soft law instruments.[94]

All these binding effects were admitted only in limited circumstances, as the Court recognized legally binding effects to soft law only with regards to the activity of the European Commission. Legally binding effects were not recognized automatically by the CJEU, but indirectly, through a mechanism based on the general principles of law.[95] The Court admitted legally binding effects in those cases because by publishing soft law instruments the Commission created a legitimate expectation that it will apply them in cases it investigates. Therefore, the Commission limited its own discretion when issuing certain guidelines and could not depart from such rules under pain of being found to be in breach of general principles of law, such as equal treatment or legal certainty.[96]

Acknowledging soft law through the intermediary of general principles of law and human rights was criticized in the literature. The content of such principles being wide and sometimes 'disputable' would make them an inappropriate point of reference to ensure

[91] Commission Notice on the non-imposition or reduction of fines in cartel cases OJ 1996, C 207/4.

[92] Case T-27/02 *Kronofrance v Commission* [2004] ECR II-4177, para.109.

[93] Multisectoral framework on regional aid for large investment projects, OJ 1998, C 107/7.

[94] Ştefan, *Soft Law in Court: Competition Law, State Aid, and the Court of Justice of the European Union* (Kluwer, 2012), p. 57.

[95] Ştefan, 37 *ELRev* (2012), p. 62-64.

[96] Joined Cases C-189, 202, 205, 208 & 213/02 *Dansk Rørindustri*, para.211.

justitiablility of soft law.[97] This paper argues the contrary. By recognizing the effects that soft law can have on the discretion of the European Commission the Courts do not transform soft law into hard law, but rather they connect it to the constitutional structure of the European Union. That is because all the principles that serve as mediation for acknowledging the self binding effect of soft law are constitutional in nature. Legitimate expectations and legal certainty are principles common to the constitutional systems of MS,[98] recognized on various occasions by Courts, and entrenched within the rule of law, a founding value of the EU according to Article 2 TEU. Equality is a constitutional value common to the MS, 'an integral part of the rule of law which underlies the political systems and the legal traditions thereof'[99] and a principle that stretches beyond the rule of law and forms an integral part of a democratic system.[100] So are also other principles cited in the case law in relation to soft law, such as the rights of defense,[101] fundamental rights,[102] and transparency.[103]

Thus, without transforming soft law into hard law, the case law of the European Courts serves a constitutional function. What is more, the case law is problematic as it operates a too rigid

[97] Hatzopoulos, 13 *ELJ* (2007), p. 336. On the OMC see also Armstrong, *Governing Social Inclusion Europeanization through Policy Coordination* (OUP, Oxford, 2010).

[98] P. Craig, 'Substantive Legitimate Expectations in Domestic and Community Law', 55 *The Cambridge Law Journal* (1996), p. 304.

[99] T. Tridimas, *The General Principles of EU Law* (2nd edn, OUP, Oxford 2006), p. 62.

[100] J. Jowell, 'Is Equality a Constitutional Principle?' 47 *Current Legal Problems* (1994), p. 18.

[101] Tridimas, *The General Principles of EU Law*, p. 370.

[102] Case 11/70 *Internationale Handelsgesellschaft* [1970] ECR 1125, para. 4.

[103] K. Lenaerts, '"In the Union We Trust": Trust - Enhancing Principles of Community Law', 41 *CMLRev* (2004), 318-319. See, also, on the principle of transparency: D. Curtin, 'Betwixt and Between: Democracy and Transparency in the Governance of the European Union' in J.A. Winter et al (eds.) *Reforming the Treaty on European Union: The Legal Debate*, (Kluwer, The Hague 1996).

distinction between soft and hard law, between legally binding force and legal effects of norms. Indeed, the EU Courts fail to acknowledge important consequences that soft law can have on the rights and obligations of individuals, as illustrated by case law concerning the application of EU soft law within networks of regulatory authorities.

The recent *PTC*[104] case concerned the 2002 guidelines on market power in electronic communications markets.[105] The Polish regulator used these guidelines to determine that an undertaking, PTC, had significant power in the market of voice call termination services, and needed to be imposed regulatory obligations in accordance to EU law.[106] PTC argued that the guidelines could not be relied on by the regulator, as they had not been published in the Polish version of the Official Journal. In preliminary ruling, the Court held that whenever the language of a new Member State is an official language of the EU, only obligations laid down in EU legislation published in that language can be imposed on individuals in that state. The question was whether the guidelines at issue could impose obligations on individuals. Textual analysis showed that the guidelines were expressly addressed to the National Regulatory Authorities (NRAs), offering them guidance, and providing for cooperation mechanisms between national regulators and the European Commission. Nothing indicated, however, that the guidelines laid down obligations for individuals,[107] thus, even if unpublished in Polish, they could be relied on by the NRA.

[104] Case C-410/09 *Polska Telefonia Cyfrowa (PTC)* [2011] ECR I-03853

[105] Commission Guidelines on market analysis and the assessment of significant market power under the Community regulatory framework for electronic communications networks and services [2002] OJ C165/6.

[106] Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services [2002] OJ L108/33.

[107] Case C-410/09 *PTC*, paras 31-34.

The conclusion reached in *PTC* points to a potential mis-match between the real impact of soft law on the rights and obligations the individuals and the judicial willingness to acknowledge and give legal weight to all the effects that soft law might produce. Even though they did not expressly lay down legal obligations for individuals, the guidelines on electronic communications markets were used by the Polish authority when assessing the regulatory obligations that needed to be imposed on the telecommunications operator. Accordingly, the guidelines affected the legal situation of individuals, a stance implied by the Court itself in the concluding paragraphs of the judgment.[108]

Through its informative function, soft law can play a dual role in EU's MLG system: enhancing the cooperation between European and national authorities, and boosting the links between institutions and individuals. This dual role was reflected in the goals expressly mentioned by the guidelines on market power in electronic communications markets*:* ensuring consistency in the application of electronic communications rules[109] and fostering foster legal certainty and transparency for businesses.[110] *PTC* shows that only one of these two functions can be accommodated under current case law. While the absence of particular publication requirements facilitates the consistent application of the guidelines across MS, legal certainty and transparency are weakened, as prior translation in the languages of the new MS is not deemed necessary for the application of such instruments.

[108] Referring to the guidelines, the Court states that there is no 'principle of EU law under which anything *that might affect the interests of an EU citizen* must be drawn in his language in all circumstances' (emphasis added). Case C-410/09 *PTC*, para. 37.

[109] Paragraph 11 of the guidelines.

[110] Paragraph 12 of the guidelines.

The 'paradox'[111] of soft law is once again confirmed: such instruments, issued in order to enhance legal certainty and transparency in the EU administrative activity, are not always easily understood by the individuals concerned. The paradox might go even further, given that the guidelines can ensure consistency in the application of the new regulatory framework only to a limited extent if the NRAs decide to disregard them. Indeed, soft law is not binding on national authorities, but it can offer clarification on the interpretation of certain EU law provisions and help in the fulfillment of the NRAs' regulatory tasks.[112]

The question is whether the NRAs could be obliged take into consideration European notices and guidelines in the name of consistent application of EU law or, indeed, in the name of legal certainty and transparency. With regards to the first imperative, ensuring consistent application of the law throughout the European Union does not appear to require national authorities and courts to take into consideration soft law issued by the Commission. As stated in the case law, only a 'de facto or soft harmonisation' can be achieved through soft law:[113] common European rules on enforcement can be set only through instruments having legally binding force. In *Pfleiderer*, the Court admitted that soft law can produce effects on the practice of national authorities: nonetheless, such effects could not be given legal weight in judicial proceedings.[114] Since soft law instruments are not binding on the MS,[115] they cannot be taken into consideration by the CJEU as a common standard.

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[111] See Senden, *Soft Law in European Community Law*, p. 497; H. Hofmann, 'Administrative Governance in State aid Policy' in H. Hofmann and A. Türk (eds.), *EU Administrative Governance* (Edward Elgar, 2006), p. 201-202.

[112] Case C-410/09 *PTC*, para. 31.

[113] Opinion of Advocate General Mazák in Case C-360/09 *Pfleiderer v. Bundeskartellamt* [2011] ECR I-05161, para. 26.

[114] Case C-360/09 *Pfleiderer v. Bundeskartellamt* [2011] ECR I-05161., para. 23.

Legal certainty and transparency cannot be invoked as grounds for requiring national authorities to comply with soft law issued at the European level either. In *Expedia,*[116] two undertakings were fined by the French Competition Authority for having concluded an agreement that constituted a restriction of competition by object. The Authority did not take into account the fact that the agreement at stake fell below the *de minimis* thresholds established by a notice of the European Commission,[117] a soft law instrument. In preliminary ruling, the Court held that the national authorities and courts were not bound by the provisions of the *de minimis* notice, and that they had complete discretion to take the thresholds mentioned therein into consideration.[118] Even though the Court mentioned the well rehearsed statement that the Commission cannot depart from its own soft law without giving reasons consistent with legitimate expectations, it noted, paradoxically, that the national authorities' disregard of the notice cannot interfere with principles such legitimate expectations and legal certainty.[119]

Thus, legitimate expectations and legal certainty have a variable content in the multi-layered system of EU competition law enforcement. On the one hand, if the case is dealt with by the European Commission, individuals are entitled to expect an application of EU soft law, or at least, to a statement of reasons as to why such instruments were not applied in their case. On the other hand, at the national level, the discretion of NCAs seems to prime over individual

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[115] *Ibid.*, para. 21.

[116] Case C-226/11 *Expedia Inc. v Autorité de la concurrence and Others*, Judgment of 13 December 2012, not yet reported..

[117] Commission Notice on agreements of minor importance which do not appreciably restrict competition under Article 81(1) of the Treaty establishing the European Community (de minimis) [2001] OJ C368/13.

[118] *Expedia.*, para.31

[119] *Ibid.*, para.32.

expectations, and national procedural autonomy is given precedence over fundamental rule of law values.

At a first glance, national procedural autonomy appears hard to reconcile with imperatives such as ensuring consistent application of EU law or fostering legitimate expectations and legal certainty. But the soft law paradox is not that difficult to solve, as suggested by Advocate General Kokott (sadly not followed by the Court in *Expedia*). She noted that, even if not bound by the *de minimis* notice, national authorities and courts should 'consider the Commission's assessment' and also 'give reasons which can be judicially reviewed for any divergences'.[120] In this scenario, national authorities can depart from EU soft law in order to accommodate national specificities[121] or particular economic circumstances that needed to be assessed on a case by case basis.[122] However, if they decided not to rely on EU soft law, they would either need to give reasons for this, or issue their own general soft law laying down guidelines on national practice.[123]

This solution would enhance legal certainty and help protect legitimate expectations and equality within all levels of EU competition law enforcement. Accordingly, EU soft law would be applicable by default by the NCAs, and individuals can expect to obtain an explanation in case of decisions that depart from notices and guidelines of the Commission. Such solution would accommodate diversity within the ECN, as it would allow NCAs to issue *their own soft law* to explain the ways in which they will apply competition rules in case the national context requires different interpretation than that provided for in EU instruments. The solution suggested by the AG encourages the NCAs to be more transparent about their work

[120] Opinion in Expedia, para.39.

[121] *Ibid.*, para.42.

[122] *Ibid.*, para.41.

[123] *Ibid.*, FN 40.

and ensure similar level of certainty as that ensured by the European Commission through its guidelines and notices.

5 The Influence of Soft Law and Soft Governance Methods on Courts

New governance can influence courts as well. The relationship between courts and governance was represented by Hervey along a continuum ranging from 'mutual ignorance; through separation, either with hierarchy, or in parallel; to hybrid forms of mutual transformation'.[124] She argues that ignorance of new forms of governance is the norm from a traditional legal perspective. The middle position on the continuum is represented by a scenario whereby adjudication and governance have a parallel or a hierarchical relationship. Courts can reject the logics of governance if they are considered contrary to the hierarchically superior legal requirements. On the other hand, courts can endorse a 'new governance' position if it is the illustration of principles laid down by traditional law. Finally, the extreme position is represented by hybrid forms of mutual transformation, whereby the interpretation given by the courts to legal instruments becomes 'embedded in the context and experience of "new governance", bargaining or informal settlement processes'.[125]

This third type of interaction can range from strong forms, whereby mutual transformation occurs, with Courts participating actively in new governance processes while at the same time integrating the new logics of governance in adjudication. Conversely, a softer version of hybridity is represented by the transformation of legal norms or concepts. In this scenario, Courts can integrate arguments drawn from governance processes in the analysis of proportionality, when assessing justifications to restrictions of free movement in the internal market.

[124] Hervey, 63 *Current Legal Problems* (2010), p. 138.

[125] *Ibid.*, p. 144.

Hervey finds two types of arguments for such hybrid relationship between adjudication and new governance. First, from a traditional legal point of view, soft law produced through new governance processes serves the purpose of developing hard law provisions, set out in the EU Treaties. In accordance with Article 31 of the Vienna Convention, courts are bound to take into account subsequent practices in the application of the treaty establishing the agreement of the parties regarding its interpretation. Or, the soft law created through OMC processes voices the agreement of the MS on various issues dealt with to a certain extent by the EU Treaties. Consequently, courts should pay attention to such soft law instruments. However, under this traditional scenario, courts cannot be forced to apply soft law, but only to acknowledge them and eventually 'justify departure from any very settled (accepted and institutionalized) position within "new governance" processes'.[126]

A second, constructivist perspective, justifies a stronger hybrid relationship between adjudication and soft law issued from OMC processes. On the one hand, this perspective relies on (contested) advantages of the OMC: its participatory nature, its effectiveness in governing multi-level contexts and in fostering learning, etc. Courts should thus take into account soft law issued from OMC processes in order to enhance their own legitimacy and robustness,[127] while engaging with topics and solutions that are the subject of debate across jurisdictions. On the other hand, Hervey points out that adjudication should combine with new governance for the simple reason that no other valid choice is available. As recent cases such as *Laval*[128] or *Viking*[129] demonstrate, the interface between fields of exclusive EU competence

[126] *Ibid.*, p. 149.

[127] *Ibid.*, p. 150.

[128] Case C-341/05 *Laval* [2007] ECR I-11767.

[129] Case C-438/05 *International Transport Workers' Federation and Finnish Seamen's Union v Viking Line ABP and OÜ Viking Line Eesti* [2007] ECR I-10779.

(such as the internal market) and fields controlled by the sometimes diverging interests of the MS (such as social welfare) creates problems (such as 'the problem of social Europe') that cannot be solved through the classical decision making processes provided for in the Treaties.[130] This is because of the particular repartition of competences and constitutional arrangement provided for in the Treaties, as well as the different political interests in the matter. Striking the balance between the benefits of EU law and market integration and the benefits of national welfare can be done through new governance mechanisms, such as the OMC, and indeed through adjudication.[131] As suggested by Hervey, 'a mutually transformative relationship' between adjudication and new governance mechanisms is desirable, bringing together 'the best features from each process in a symbiotic interaction'.[132]

Hervey conducted her study in the social welfare sector and found evidence for the first and the second types of interaction. She did not find many cases to substantiate the third type, mainly because of the relative novelty of new governance methods in the particular field of research. In fact, also other studies showed a limited impact of the OMC on the case law. In a study on the effects of Lisbon strategy on European law, Smismans discovered that while the ideational and organizational components of the strategy had an effect on regulatory output, they had a very modest effect on case law.[133]

Smismans undertook a key word search on Curia to cover Lisbon Council Conclusions, Guidelines and Recommendations issued in macro-economic and employment policy

[130] Hervey, 63 *Current Legal Problems* (2010), p. 98-103.

[131] *Ibid.*, p. 151-152.

[132] *Ibid.*, p. 152.

[133] S. Smismans, 'From harmonization to co-ordination? EU law in the Lisbon governance architecture' 18 *JEPP* (2010), p. 504.

coordination.[134] His conclusion was threefold. First, the new governance instruments under investigation were not referred to in the case law to a significant extent. In his view, this occurs because unlike other soft law instruments, the OMC instruments have a solely political value and are not necessarily linked to hard law provisions, and they do not interpret directives, regulations or the Treaty. Second, the ideational repertoire of Lisbon strategy – covering terms such as competitveness and sustainability – appears more and more in the case law of the EU Courts, especially after 2000. However, as Smismans himself points out, arguing that this proves an engagement with the objectives of OMC processes is purely speculative, in the absence of judicial analyses of the instruments themselves. Finally, there is no conclusive evidence showing that Courts act as guardians of procedural standards and good administration principles in relation to processes like the OMC.[135] The research conducted by Smismans is undoubtedly sector and key word specific. Nonetheless, given the absence of relevant results in the two of the main OMC policy areas, judicial engagement with instruments issued in the framework of Lisbon/Europe 2020 processes appears indeed to be scarce.

A more optimistic perspective on the impact of soft law on adjudication is illustrated by Korkea-aho, who looked at the implementation of the Water Framework Directive through soft mechanisms based on networks and consensual enforcement. Empirical evidence showed that soft enforcement mechanisms might streamline legal actions, by offering the information and the administrative resources necessary in order to lead effective infringement proceedings. Furthermore, managing implementation through networks reduces case load, as

[134] A brief research on the same keywords used by Smismans shows similar results for cases decided up to 2013.

[135] Smismans, 18 *JEPP* (2010), p. 517-519.

problems are solved by participants, without judicial intervention.[136]As briefly outlined in the previous section, competition case law admits legally binding effects of soft law for the European Commission on the basis of a mechanism based on general principles of law (such as legitimate expectations, legal certainty, transparency).[137] Thus, hybrid interactions between adjudication and soft law occur in this sector[138] as the argumentation of the Court, based on legal principles, is inserted in new soft issued at the Commission level[139] and then back again in new judgments of the EU Courts,[140] completing some sort of 'virtuous circle'.[141] The Commission and the Court influence each other's arguments when issuing instruments deprived of legally binding force or assessing arguments based thereon in court cases. While such approach is welcome, it remains to be seen if it will be exported to other areas of EU competence. Competition law is an area of exclusive EU competence, where a multi-level governance system of enforcement authorities was put in place during the last decade. Soft law was issued in this sector since very early days of European law, and it was mainly authored by the European Commission. Competition law presents thus specificities that are not necessarily shared by other fields of EU governance, such as those covered by the OMC

[136] E. Korkea-aho, 'Watering Down the Court of Justice? The Dynamics between Network Implementation and Article 258 TFEU Litigation' *ELJ* (2013).

[137] Ştefan, *Soft Law in Court,* p. 229 et seq.

[138] *Ibid.,* p. 219-227.

[139] For example: Guidelines on the method of setting fines imposed pursuant to Article 23 (2) (a) of Regulation No 1/2003 [2006] OJ C210/2, para. 3; Commission notice on the determination of the applicable rules for the assessment of unlawful State aid [2002] OJ C119/22.

[140] See on the guidelines on fines: Case T-15/02 *BASF v. Commission* [2006] ECR II-497, para. 250. See on the notice on unlawful state aid: Case T-357/02 *Freistaat Sachsen and others v. Commission* [2007] ECR II-1261, para. 118.

[141] A. Stone Sweet, "Judicialization and the Construction of governance" 31 *Comparative Political Studies* (1999), p. 158-159

processes. Furthermore, even in competition law, the CJEU is reluctant to apply the same principle-based formula when assessing the effects that EU soft law may produce at the national level, thus obstructing some of the functions that such instruments can play in the multi-layered system of enforcement of EU competition policy.

6 Conclusion

While soft law and new modes of governance such as the OMC became established tools of a constitutionally adult MLG system, the CJEU has kept the pace only to a limited extent with the changes at the regulatory level. Courts are ready to acknowledge very limited legal effects of soft law instruments in some sectors, such as competition, but they do not appear to engage with instruments stemming from OMC processes. The grounds and the intensity of effects judicially recognized to soft law instruments vary in accordance to the level where they are invoked – European or national, and this weakens individual rights. Consequently, the miss-match between the consequences that soft law can have on the legal situation of individuals and the effects given judicial recognition may be detrimental to the functions that such instruments are meant to fulfill in a MLG context. Furthermore, this miss-match allows a significant amount of soft law to escape the judicial scrutiny of EU Courts, possibly enhancing the legitimacy deficit of which such instruments arguably suffer.

In this context, the Court should be less concerned about establishing clear cut boundaries between soft and hard law, and be even more open than before to arguments based on soft law instruments and to the ideology put forward by new modes of governance. This would allow the EU judicial body to control a larger array of acts, and ensure that the latter do not go beyond superior, constitutional principles written down in ‘traditional’ legislation, such as the EU Treaties. Courts can address to a certain extent the legitimacy concerns surrounding soft law and soft methods of governance, by checking that the procedures ensuring participation

and openness of decision making have been respected. While constitutional adulthood of MLG is not entirely dependent on adjudication, Courts might help soft law to be more effective and to reach its full potential to 'loosely' connect the different layers of EU governance.